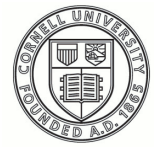



12-2015

# Hong Kong Employment Law Wrap Up

Baker & McKenzie

# Hong Kong Employment Law Wrap Up


## Abstract

In This Issue:

- Five Things Employers Need to Know About the Contracts (Rights of Third Parties) Ordinance
- Competition Ordinance in Full Force From 14 December 2015
- Statutory Holidays Increase: Finally on the Horizon?
- CFI Upheld Broker's Post Termination Restrictions
- Court of Appeal Applies Close Connection Test and Finds Employer Liable for Employee Assault
- Court Refuses Appeal Against Labour Tribunal's Order For Security for Payment December



## Keywords

Baker & McKenzie, China, employment law, Hong Kong

# Hong Kong Employment Law Wrap Up

BAKER & MCKENZIE

December 2015

## In This Issue



## Editorial

This year we have seen a dramatic rise in CEO fraud cases, which involve fraudsters phishing information from companies and setting up fake email addresses very similar to those of senior management and sending instructions to transfer funds, allegedly on behalf of senior management, to the accounts of companies established by the fraudsters. This is only made possible by staff not adhering to policies and protocols. We have also seen a rise in the misuse of confidential information which has led to a number of applications for injunctions and, on some occasions, search and seizure orders (Anton Piller orders). We have observed an increase in the number of prosecutions brought by the Labour Department for wage offences under the Employment Ordinance and recently Asia TV has been on the receiving end of media interest as a result of a Labour Department prosecution for wage offences. The company was fined HKD$ 1,070,000 and a director was convicted and fined HKD$ 150,000 for his consent, connivance or neglect in the wage offences committed by the company.

Looking forward we anticipate that 2016 may have more bigger picture issues arising with the Contracts (Rights of Third Parties) Ordinance coming into force at the beginning of the year, the expected release of the Equal Opportunities Commission's report on the Discrimination Law Review in March and the appeal for *Sunny Tadjudin v. Bank of America* is likely to be heard in the latter part of the year. With an election in 2017, the pressure will also be on for the government to finally come through on some promises made on standard working hours, the long awaited MPF set off and perhaps the continuous contract requirement? Well perhaps only Santa can deliver on that much, but we will wait and see and keep you posted!

We hope you have a great holiday and look forward to sharing more with you next year.

*Susan and Rowan*


**Hong Kong**
14th Floor, Hutchison House
10 Harcourt Road, Central, Hong Kong
Tel: +852 2846 1888
Fax: +852 2845 0476

**Beijing**
Suite 3401, China World Office 2
China World Trade Centre
1 Jianguomenwai Dajie,
Beijing 100004, PRC
Tel: +86 10 6535 3800
Fax: +86 10 6505 2309

**Shanghai**
Unit 1601, Jin Mao Tower
88 Century Avenue, Pudong
Shanghai 200121, PRC
Tel: +86 21 6105 8558
Fax: +86 21 5047 0020

# In the Spotlight:

## Five Things Employers Need to Know About the Contracts (Rights of Third Parties) Ordinance

Employers will be aware that from 1 January 2016, third parties to a contract may, in certain circumstances, benefit from a contract or enforce its terms under the new *Contracts (Rights of Third Parties) Ordinance (Cap 623)* ("the Ordinance"), which amends the common law position of "privity of contract". The new law will only apply to contracts entered into after 1 January 2016 and will not have a retrospective effect therefore employers should consider how this new law may help and/or hinder them and take action accordingly. We have identified five points that employers should know about the Ordinance and its practical effect.

**1. What will the Ordinance do?**

The Ordinance reforms the doctrine of "privity of contract" in Hong Kong which provides that only those who are named in a contract and have signed it are able to enforce the contract; anyone else is considered a third party and does not have any rights or cannot access any benefits.

The Ordinance amends the common law position so that a third party may enforce a term in a contract in either of the following circumstances:

1. where the contract expressly provides that the third party may do so; or
2. the term purports to confer a benefit on the third party.

The term "benefit" is not defined, therefore the contract will need to expressly address whether any term is to benefit or be enforced by a third party. The third party must be expressly identified in the contract by name, as a member of a class or as answering a particular description. It is possible to confer rights on a third party, which is not in existence when the contract is entered into.

**2. Think it through:**

It is important to appreciate that the third party will be entitled to any remedy (for example, money, benefits, or both) that would have been available had they been a party to the contract. In addition, unless expressly provided otherwise, once the right of the third party has been crystallized, the contracting parties may not amend or rescind the contract to invalidate or modify the third party's entitlement under that right, without the third party's consent.

**3. Employment contracts: No third party enforcement against an employee**

Third parties are not permitted to enforce the terms of an employment contract against employees but this does not prevent third parties from enforcing terms in the employment contract against the employer.

The types of scenarios where third parties may seek to enforce their rights against an employer in an employment contract may include where family

members of the employee are entitled to benefits such as for example medical insurance, medical assistance (evacuation etc.), relocation or repatriation expenses, education allowance for dependents, immigration sponsorship, travel benefits, club membership and housing. In the event of the employee's death, family members may seek to enforce their rights for death in service benefits, medical evacuation benefits or even repatriation of mortal remains.

Employers can exclude the application of the Ordinance from their employment contracts thus preventing third parties from enforcing their rights and this is explored further below.

**4. Ordinance will apply to employment related contracts**

The Ordinance does not exclude third parties from enforcing their rights in employment related agreements. This means that if an employer has entered into stand alone agreements for matters such as confidentiality or non-competition for example then third parties will have the right to enforce relevant terms subject to the requirements under the Ordinance being satisfied. This will be useful for associated companies in the following scenarios:

- Settlement agreements where the release from liability includes all the companies in a group;
- Post termination restrictions agreements where group companies benefit from the covenants entered into by the employee;
- Confidentiality agreements where an employee is obliged not to disclose confidential information relating to the employer and its associated group companies. This is useful if the employee has been seconded to an associated company and has had access to commercially sensitive data;
- Secondment agreements - where the employee may have obligations to the host company for non-disclosure, confidentiality etc.; and
- Share incentive agreement - where an associated company issues the shares to the employee.

**5. "Contracting Out" of the Ordinance**

A third party may not enforce a term of a contract *"if on proper construction of the contract, the term is not intended to be enforceable by a third party"*. The Ordinance makes reference to enforcing a "term" rather than the whole contract. It is therefore possible for parties to pick and choose those terms enforceable by a third party and those terms that are not. The Ordinance does not explicitly allow parties to "opt out" of the Ordinance, however parties can effectively exclude the operation of the Ordinance by including a clause that expressly confirms the contract does not confer any rights enforceable by a third party. In the UK, the most common approach is to exclude the UK law's operation by including a boilerplate clause to that effect.

Obviously, if third parties are to be given enforceable rights, careful consideration should be given whether to place any limits or conditions on these rights. Conversely, where it may be beneficial for a party to allow third parties to benefit (such as those set out above) then the contract language should be clear in terms of making sure that the benefits are conferred.

**Action Plan**

**Identify potentially relevant third parties** whose rights should be preserved or for whom enforcement rights should be given (e.g. group companies).

**Update standard contracts to ensure that the Ordinance is taken into account.** Either exclude the application of the Ordinance, or use it where intended.

**Where third parties are to be given enforceable rights, ensure that these rights are clearly expressed in the contract.** Consider whether there should be any conditions or restrictions on the third party's ability to enforce rights (e.g. should the third party have the right to assign the benefit of its rights?)

**Update standard contracts to ensure that the Ordinance is taken into account.** Either exclude the application of the Ordinance, or use it where intended.

The new Ordinance may prove interesting in the employment sphere and it certainly represents an opportunity to plug some gaps due to the current legal position. We do not anticipate any significant developments in the short term and anticipate that initially it will just result in an exercise in amending templates.

The Baker & McKenzie Commercial team have examined the Ordinance in detail and their client alert can be accessed via this **link**.

## Competition Ordinance in Full Force From 14 December 2015

The Competition Ordinance was partially implemented in January 2013 following its passing in June 2012. The purpose of this delay was to provide time for the establishment of the Hong Kong Competition Commission and the Competition Tribunal.

The Ordinance contains three competition rules:

**First Conduct Rule: prohibits anti-competitive conduct involving more than one party;**

**Second Conduct Rule: prohibits anti-competitive conduct by a party with substantial market power; and**

**Merger Rule: prohibits anti-competitive mergers and acquisitions in the telecommunications sector.**

From an employment law perspective, employers will need to have a few items on their radar prior to the full implementation of the Ordinance including some of the following:

**Relevant prohibitions under the Ordinance**

Indemnities for employees for costs incurred in connection with infringements of competition law are prohibited under the Ordinance

**Information sharing**

Participation in benchmarking and salary surveys could be construed as anti-competitive information sharing in certain circumstances

**Collective bargaining**

The Competition Commission has issued guidelines which confirmed that collective bargaining between a group of employees and their employer in relation to employment matters such as salaries and conditions of work will not be considered a contravention to the Competition Ordinance, as employees are an integral part of the employer. In particular, the Guidelines state that the Competition Ordinance will not apply to collective negotiations between an employer and a trade union where it acts as an agent representing a number of employees.

Employers should seek advice where they consider that there may an impact on their practices.

# News Recap:

| When | Topic | Summary | Action |
|---|---|---|---|
| 1 May ▶ | Statutory Minimum Wage: Increase to rate | The statutory minimum wage rate increased to HK$32.5 per hour on 1 May 2015. The increased rate led to an adjustment on the monthly monetary cap on keeping records of hours worked which means that since 1 May, employers have to retain records of hours worked for employees whose wages payable are less than HK$13,300. | Check and ensure compliance |
| | Proposal to have annual minimum wage rate recommendation | A Minimum Wage (Amendment) Bill has been proposed which seeks to require the Minimum Wage Commission to submit its recommendation report on the statutory minimum wage rate on an annual basis. | Watch this space |
| July ▶ | Employers breach data privacy law:<br><br>Collection of Fingerprint Data | The Privacy Commissioner found that an employer's collection of employees' fingerprint data for safeguarding office security and monitoring attendance was excessive and unfair. Queenix Asia Ltd had experienced a number of thefts committed by staff and customers and the installation of fingerprint recognition devices was to prevent unauthorised entry and such thefts. The Commissioner observed that as finger print data is unique, it must be protected against identity theft or misappropriation and should only be collected and used where justified. Queenix had already installed CCTV cameras and a variety of locks which rendered the finger print recognition devices unnecessary and passwords or smartcards were suggested as less intrusive alternative means for monitoring attendance.<br><br>The Office for the Privacy Commissioner recently published 'Guidance on Collection and Use of Biometric Data'. This provides practical guidance to data users on how to comply with the requirements of the Personal Data (Privacy) Ordinance. The Guidance can be accessed via this **link**. | If employers are collecting biometric data, they should ensure that they follow the guidance on this issued by the Office of the Privacy Commissioner. |

| When | Topic | Summary | Action |
|---|---|---|---|
| July ▶ | Employers sanctioned for use of blind recruitment advertisements | 42 employers were sanctioned for placing<br><br>job advertisements to solicit job applicants' personal data without disclosing their identities.<br><br>These blind recruitment advertisements ("Blind Ads") breached the fairness principle for personal data collection. The Commissioner served enforcement notices on the 42 employers concerned directing them to delete the personal data collected and to formulate a company policy of placing recruitment advertisement which were compliant with data privacy legislation.<br><br>The Commissioner advised employers that if there was a genuine need to conceal their identities when advertising a vacancy, they should not seek a full CV from applicants and only request enquiries from interested candidates. | The elimination of Blind Ads is a key priority for the Office of the Privacy Commissioner therefore employers are advised to ensure they are compliant in their recruitment practices. |
| August ▶ | Mandatory Provident Fund ("MPF") - early withdrawal of benefits permitted for terminal illness | The addition of terminal illness as a ground for applying to make an early withdrawal of MPF benefits became operative on 1 August 2015.<br><br>The Mandatory Provident Fund Schemes Ordinance requires that a registered medical practitioner or a registered Chinese medicine practitioner issues a medical certificate to confirm that the scheme member has an illness that is likely to reduce the member's life expectancy to 12 months or less. At this stage, there is no specific list of diseases that are considered to constitute terminal illness. | For awareness |

| When | Topic | Summary | Action |
|---|---|---|---|
| October ▶ | Standard Working Hours Committee - 16th Meeting and More Consultation to Come | The Standard Working Hours Committee ("SWHC") has agreed in principle to recommend exploring a legislative approach which will require employers and employees to enter into written employment contracts which specify terms relating to the number of working hours, overtime work arrangements and methods of overtime compensation. This is referred to as the "big frame" and a "small frame" is currently being explored which involves creating protection for employees with lower income, skills and less bargaining power.<br><br>The "big frame" falls far short of setting a statutory maximum number of working hours, instead it seems that the onus will be upon the employer and employee to reach an agreement on hours.<br><br>The SWHC will be commencing further consultation in December 2015 and will need to act expeditiously as they must present their final proposals to the government before their mandate expires in March 2016. This will be a challenge as it was reported that six employee representatives refused to remain at a recent meeting due to the employer representatives failing to support legislation to regulate working hours. Clearly there is a significant divergence in views on the best way forward and how to balance employer and employee interests. | Watch this space but you may need to sit down while waiting... |
| 1 January 2016 ▶ | Contracts (Rights of Third Parties) Ordinance comes into force | | |

## Statutory Holidays Increase: Finally on the Horizon?

Hong Kong's operation of two separate systems for holidays has created a disparity in the number of days holiday that employees in certain sectors and occupational groups are entitled to. This may change as the government is considering a proposal to increase the number of statutory holidays from 12 to 17 days. However, the Secretary for Labour and Welfare, Mr Matthew Cheung Kin-chung, confirmed an approach will only be formulated once a consensus is reached on this issue by the Labour Advisory Board. This means that any changes may take years to transpire as consultation and dialogue on this issue can be traced as far back as 1982. Against the backdrop of an election, the government will be keen to secure the public's support on any proposal and will have to find a way to balance the interests of employers and employees before formally committing to a course of legislative change.

**Background**

The General Holidays Ordinance stipulates which days shall be kept as holidays by all banks, educational establishments, public offices and government departments and although general holidays apply to the establishments (i.e. they must close on those days) in practice, those establishments grant their staff paid leave on the relevant days as do many other businesses. The Employment Ordinance grants statutory holidays to all the employees to which it applies and this is irrespective of any other factors. There has been concern for decades about the impact that these two systems have on employees, namely that those who are in the higher-skilled occupational groups (e.g. managers, administrators and professionals) tend to benefit from general holidays of which there are 17, whilst those in the lower-skilled occupational groups (e.g. service and sales workers) tend to only be entitled to statutory holidays of which there are only 12.

The Labour Department commissioned a survey in 2011 in order to fully understand the scope and potential implications of an increase to the number of statutory holidays. This showed that 1.4 million employees (approximately half the workforce excluding foreign domestic workers) would benefit from the increase in statutory holidays. The survey also revealed that workers in low-paying industries such as restaurants, estate management, security and cleaning services, food processing and production, laundry and dry cleaning services, and retail would be the main beneficiaries of the increase. The Government Economist estimated that the cost for one additional statutory holiday amounts to HK$0.37 billion based on the 2011 wage level. However the revenue that will be generated by the increased number of people spending on those public holidays is likely to offset some of the cost.

As above, the increase to the number of statutory holidays is unlikely to materialise for some time yet and it has been reported that the additional five days may be added over a period of five years (one additional statutory holiday per year) when th e change is finally made.

# Case Review

## CFI Upheld Broker's Post Termination Restrictions

*GFI (HK) Securities LLC v. Gyong Hee Kang & Anor [2015] HKCU 1394*

**In brief:**

GFI (HK) Securities LLC ("**GFI**") successfully applied for an interlocutory injunction preventing a former senior broker, Ms Kang ("First Defendant") from breaching her obligations of non-solicitation and non- dealing when she joined a competitor, ICAP ("Second Defendant") whilst her restrictions remained active.

The Court of First Instance ("**CFI**") held that GFI had reasonably good prospects of success at trial and this decision was reached following an assessment of the enforceability of the restraints and the evidence substantiating the First Defendant's breaches. The CFI applied a three stage test to analyse the enforceability of the restraints and concluded as follows:

<table>
<tr><th colspan="4">CFI's Findings</th></tr>
<tr><th>Restriction (in broad terms)</th><th>Proper construction of restraints?</th><th>Legitimate interests to protect</th><th>Reasonableness</th></tr>
<tr><td>Non-deal: for six months immediately after the termination of the contract not to accept ...[nor] facilitate the acceptance of orders or instructions from any person who in the previous 12 months had been a client</td><td rowspan="2">The terms were found to be plain and unambiguous</td><td rowspan="2">Customer connections and confidential information were valid and legitimate to protect in this sphere of business.<br><br>The First Defendant had access to trade secrets and a connection with and influence over the employer's customers and it was reasonable for GFI to protect this.</td><td rowspan="2">At the interlocutory stage, the CFI only had to consider whether it was plain and obvious that the restraints would fail after an examination at trial. On the basis of this low threshold, the restraints were regarded as having a reasonable prospect of being upheld.<br><br>The CFI noted that when considering whether the length of restraint was reasonable (6 months), factors such as replacing the departed employee, allowing the new employee to build up trade connections and time to pass so that confidential information became outdated, were all relevant factors to be included in the analysis.<br><br>The CFI commented on five other cases in the finance industry where restrictions ranging from six months to one year were held to be reasonable.</td></tr>
<tr><td>Non-solicit: for six months immediately after termination of the contact not to directly or indirectly canvass or solicit business from any person who was a client of GFI in the previous 12 months, nor to accept or facilitate the acceptance of orders or instructions from any such client</td></tr>
<tr><td>Non-compete: for six months immediately after termination of the contract not to be involved in any relevant business, defined as any business carried on by GFI at the termination date</td><td colspan="3">The First Defendant argued that if the post termination restrictions were upheld, this would entirely prevent her from working. As a result, GFI withdrew the non-compete claim.</td></tr>
</table>

**Take away points:**

This case is useful for employers in the finance industry to benchmark their restrictions against and in particular for the observations made by the CFI that generally restrictions of six months in this industry appear to be reasonable although each case rests on its own facts.

GFI only learned that the First Defendant was in breach of her restrictions half way through their term, leaving only three months remaining before they expired. As a result, the application for an injunction had to be determined on an interlocutory basis as a full trial could not have taken place before the restrictions expired. The benefit to GFI was that their application was subjected to a lower threshold test (i.e. reasonable prospects of success at trial) rather than a full and detailed examination of the restrictions which would have been the case had it proceeded to a full hearing. Therefore they were at an advantage and were always likely to have had a strong chance of succeeding as a result. In those circumstances, it may have been worthwhile for the new employer to agree to the departing employee taking up an ancillary role rather than incur the cost of defending an interlocutory injunction where only three more months of the restriction remained.

## Court of Appeal Applies Close Connection Test and Finds Employer Liable for Employee Assault

*Yeung Mei Hoi v Tam Cheuk Shing and Another [2015] HKCA 109*

[Full length article published in Human Resources, September 2015 issue]

**In brief:**

In a decision that will affect all employers, the Court of Appeal ("**CA**") has recently found an employer ("**Employer**") vicariously liable for the assault on a supervisor ("**Supervisor**") by a fellow employee ("**Employee**"), as the assault took place at work.

The Court of First Instance ("**CFI**") had taken the view that the Employer could not be vicariously liable as it could not be fairly said that the assault had taken place in the course of execution of the Employee's duties. The CA overturned the decision of the CFI and held that the unauthorised assault was closely connected to the Employee's employment, making the Employer vicariously liable for the incident.

**Background:**

The Employer, a management company of a residential estate, hired the Employee as a security guard and the Employee reported to the Supervisor. The Employee assaulted the Supervisor after the Supervisor questioned him about his failure to promptly report the location of a taxi carrying a suspected drunken passenger and for failing to wear his uniform properly. During a heated exchange, the Employee punched and struck the Supervisor on the head with a walkie-talkie. The Supervisor brought a personal injury claim against both the Employee and the

Employer. The CFI entered judgment against the Employee but dismissed the vicarious liability claim against the Employer, on the basis that the assault was outside of the scope of what could reasonably be interpreted as acts relating to the business of the Employer. The Supervisor lodged an appeal against this decision which was heard by the CA earlier this year.

**Decision:**

The CA allowed the appeal and entered judgment for the Supervisor against the Employer.

The CA applied the 'close connection test'[1] and found that the Employee's unauthorised assault was closely connected to his employment as he was on duty when he lost his temper and assaulted the Supervisor. The CA found that the scope of employment at that time required the Employee to be subject to the Supervisor's supervision and discipline and that the unauthorised assault was a risk that flowed from the system of discipline and supervision implemented by the Employer. On this basis, the CA held that it was fair and just to hold the Employer vicariously liable, as the Employer could obtain insurance against this risk.

**Take away points:**

This case is a reminder that employers should consider what preventative measures they can take to minimise the chances of any harm coming to their employees whilst undertaking their duties at work. It is difficult to predict how an employee may respond to being actively supervised and/or disciplined and it seems likely from this decision that courts will find that even unauthorised acts taken by the employee in the work place can render the employer vicariously liable. Each case will rest upon its own facts but it was noteworthy that the CA raised the point that the employer could insure against these risks, the sub-text being that justice requires that the injured party should be able to recover damages and, ultimately, the employer will have deeper pockets than the employee who caused the injury.

Employers should look out for warning signs and initiate disciplinary proceedings against recalcitrant employees. Addressing problematic situations promptly will reduce the risk of such incidents taking place. This, in turn, will minimise the risk of claims.

## Court Refuses Appeal Against Labour Tribunal's Order For Security for Payment

*Lam Che Fu v The Chinese Kitchen (Sai Kung) Limited - [2015] HKCU 1607*

**In brief:**

The Labour Tribunal can order a party to give security for payment of an award or order, either of its own motion or on the application of a party

1 Ming An Insurance Co (HK) Ltd v Ritz-Carlton Ltd (2002) 5 HKCFAR 569

**www.bakermckenzie.com**

To find out more about how our Employment Law Group can add value to your business, please contact:

**Susan Kendall**
Direct: +852 2846 2411
susan.kendall@bakermckenzie.com

**Rowan McKenzie**
Direct: +852 2846 2103
rowan.mckenzie@bakermckenzie.com

Tier 1 law firm for Employment in China and Hong Kong – *Asia Pacific Legal 500, 2009 – 2016*

Leading law firm for Employment: Hong Kong Law and PRC Law (China/Hong Kong) – *Chambers Asia, 2009 - 2015*

Winning Law Firm for Employment & Industrial Relations (International Firms) – *China Business Law Journal, China Business Law Awards 2013*

Best Labor Law Team of the Year - China STAFF Awards 2012

In-house Community Firm of the Year: Hong Kong Employment – *Asian-MENA Counsel's Representing Corporate Asia & Middle East Survey 2013*

In-house Community Firm of the Year: China Employment – *Asian-MENA Counsel's Representing Corporate Asia & Middle East Survey 2013*

Honourable Mention: In-house Community Firm of the Year: Employment (China & Hong Kong) – *Asian-MENA Counsel's Representing Corporate Asia & Middle East Survey 2014*

following amendments to the Labour Tribunal Ordinance in December 2014.

This power was recently exercised in the case of *Lam Che Fu v The Chinese Kitchen (Sai Kung) Limited* when the Presiding Officer ordered the Claimant to pay HKD 14,452 within one month as security for payment of an award. The Claimant applied to the Court of First Instance ("**CFI**") for leave to appeal against the Presiding Officer's order on the grounds of error of law. The CFI refused to grant leave to appeal on the basis that the Presiding Officer had not committed any significant mistake or made an error of law when exercising her discretion to order the Claimant to pay security for an award.

## Background:

The Claimant brought claims to recover overtime pay and arrears of wages and the Defendant issued a counterclaim for failure to serve reasonable notice. The Defendant conceded that some money was owed to the Claimant for unpaid wages but disputed the amount. The Presiding Officer took the view that as another hearing was required, it was just and expedient to order the Claimant to give security as she considered his claim was very weak and he had no defence in response to the Defendant's counterclaim. In the circumstances, the Claimant's conduct constituted an abuse of process which justified the order and the CFI agreed with her decision.

## Take away points:

This case demonstrates that the Labour Tribunal are prepared to be robust where they perceive that there is an abuse of process and are prepared to act on their own initiative where the circumstances warrant it.